

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

**FILED UNDER SEAL**

UNITED STATES OF AMERICA	)	
	)	
v.	)	CRIMINAL NO. 13-10200-GAO
	)	
DZHOKHAR TSARNAEV	)	

**MOTION TO ADMIT TESTIMONY OF SISTER HELEN PREJEAN**

Defendant, Dzhokhar Tsarnaev, by and through counsel, respectfully moves that the Court permit the testimony of Sister Helen Prejean. The proffer requested by the Court follows.

**PROFFER**

Sister Helen Prejean is a Catholic nun who belongs to the Sisters of St. Joseph in New Orleans, Louisiana. Members of the order work in several fields, including health care, education, and social justice.

Sister Helen joined the order in 1957. She has been the Religious Education Director at St. Frances Cabrini Parish in New Orleans, the Formation Director for her religious community, and has taught junior and senior high school students. Sister Helen began her prison ministry in 1982, and since then has ministered to prisoners facing death or life imprisonment for murder. She also works with families of murder victims.

Sister Helen's work with prisoners began while she was working in the inner city of New Orleans and was asked to correspond with a death row inmate. She did so, and became his spiritual advisor. As she got to know him and learned more about his terrible

crimes -- the murder of two teenagers in cold blood -- she struggled to reconcile her outrage at the horrific things he had done with her recognition of his humanity.

This experience led her to work with other inmates, maintaining relationships that may last for many years. For some prisoners, Sister Helen serves as a spiritual advisor, although very few of the prisoners are Catholic and some are not religious at all. She does not seek to convert them. She describes her role as “accompanying” prisoners, helping them come to grips with what they have done and the pain they have caused, and to take responsibility for their actions.

The prisoners with whom she has worked do not always demonstrate remorse: some take many years to acknowledge what they have done and the pain and grief they have caused; some are only able to do so in a very limited way.

Earlier this year, shortly before the first phase of the trial began, defense counsel, through a member of the defense team who had known Sister Helen for many years, asked her to meet with Dzhokhar, in the hope that she would be able to help him continue to process the pain and grief he has caused. She agreed to do so and to see whether he would be open to working with her. As she had never before worked with a Muslim, she prepared for this meeting by reading portions of the Qu’ran and learning more about Islam. Sister Helen first met Dzhokhar in early March of this year, as the first phase of the trial was about to begin. She told him that she was a Catholic nun, unsure how he would respond. In their first meeting, she found him to be open, congenial, and respectful. She felt they had an immediate rapport. She also was struck by how young he seemed.

They discussed religion, scripture, and the pain, grief, loss and sorrow that he has caused. They found a common language to talk about spirituality, regret, and the importance of the religion in shaping our lives. They discussed common ground – as well as differences -- between the basic tenets of Islam and Christianity. He was open to her perspective.

During March, April, and May, Sister Helen met with Dzhokhar a total of five times, for about five hours all together.

Sister Helen sees in Dzhokhar an awareness of the pain and anguish that he has caused. He told her that he regrets his actions and that no one deserves the suffering he realizes he caused. She will discuss her assessment of his remorse, including that she believes he is sincerely remorseful and will painfully remember and relive his actions and the harm he caused for the rest of his life. She bases this belief on her interactions with him and his youthfulness.

Sister Helen sees in Dzhokhar a very young man with the potential to grow and mature, and to continue to grasp and face up to the harm that he has caused. If she is allowed to do so, she would visit him in the years ahead, and accompany him on his way.

### ARGUMENT

#### I. THE GOVERNMENT HAS PUT THE DEFENDANT'S CURRENT REMORSE AT ISSUE.

During the lobby conference on May 7, the prosecution maintained that its opening statement solely claimed that Mr. Tsarnaev was “unconcerned, unrepentant and unchanged” at the time of his arraignment on July 10, 2013. The transcript shows



otherwise. Before government counsel even showed the still photo from the cellblock video, she argued that the evidence “will tell you that Dzhokhar Tsarnaev *was and is unrepentant, uncaring, and untouched* by the havoc and the sorrow that he has created.” Tr. 4/21/13 (opening statement) at 13 (emphasis added). *See also id.* at 11 (“[E]verything you know and will know about Dzhokhar Tsarnaev and the crimes that he committed will reinforce he simply *is callous and indifferent to human life*” ) (emphasis added); *id.* at 17 (arguing that Mr. Tsarnaev “remains the unrepentant killer that he is”); *id.* (“And for Dzhokhar Tsarnaev, his decisions and his actions and his beliefs made up *who he was and who he is.*”) (emphasis added). The prosecution knew at the time that there was contrary evidence, [REDACTED]

[REDACTED]

The government now claims that the only way that the defense can respond to the government’s allegation that Mr. Tsarnaev, to this day, lacks remorse is by having him testify under oath and submit to cross examination. This simply cannot be true. Such an approach would force him to choose between his Fifth and Eighth Amendment rights. *Cf. Simmons v. United States*, 390 U.S. 377, 393-94 (1968) (defendant should not be forced to choose between Fourth and Fifth Amendment rights).

The cases that the government cites do not support its argument. In each, the defendant sought to make an unsworn and unlimited statement to the jury, and the court held that the defendant did not have a *right* under Fed. R. Crim. P. 32 or under the Constitution to make such a presentation. In several of them, the courts of appeal held that such evidence would be cumulative of evidence of remorse that already had been

presented in the form of out-of-court statements. *See, e.g., United States v. Lawrence*, 735 F.3d 385, 408 (6<sup>th</sup> Cir. 2013) (defense introduced journal entry in which defendant apologized for killing victim); *United States v. Hall*, 152 F.3d 381, 396 (5<sup>th</sup> Cir. 1998) (defendant's sister testified about statements of remorse he made to her). *Cf. United States v. Lighty*, 616 F.3d 321, 364-65 (4<sup>th</sup> Cir. 2011) (finding no abuse of discretion in exclusion of letter from defendant to mother to rebut lack of remorse where it did not actually express remorse, and finding admissibility to show character "closer question" but on balance harmless where cumulative at best of, *inter alia*, testimony that defendant told a witness that he "felt badly" about the murder).<sup>1</sup>

Nor should the Court preclude Sister Helen from testifying about her belief regarding the sincerity of Mr. Tsarnaev's remorse. *Cf. United States v. Jaensch*, 552 Fed. Appx. 206 (4<sup>th</sup> Cir. Nov. 14, 2013) (unpub.), (holding that trial court erred in refusing to permit a witness to testify as to his opinion about the sincerity of the defendant's beliefs whether a certain regulatory tax scheme applied to him; witness "was not prohibited from giving his opinion, based on his perceptions, of Jaensch's sincerity if his testimony satisfied the three conditions of Rule 701.").

## II. OPINION EVIDENCE OF CHARACTER IS ADMISSIBLE.

Character is, of course, relevant during the penalty phase of a trial. Moreover, the government has put it squarely at issue. In her opening statement, government counsel

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<sup>1</sup> A number of federal courts have permitted defendants to make an unsworn allocution to the jury in capital cases. *See, e.g., United States v. Whitten*, 610 F.3d 168, 196 (2<sup>nd</sup> Cir. 2010) (reversing based on prosecutor's comment on failure to testify); *United States v. Williams*, 18 F.Supp.3d 1065 (D. Hawaii. 2014); *United States v. Henderson*, 485 F.Supp.2d 831, 845 (S.D. Ohio 2007); *United States v. Gabrion*, 2002 U.S. Dist LEXIS 1379 (W.D. Mich. 2002); *United States v. Chong*, 104 F.Supp.2d 1232 (D. Hawaii 1999).



argued that, the question of the appropriate penalty “will be found in the *entire sum of Dzhokhar Tsarnaev’s own character* and his own actions.” Tr. 4/21/15, Opening Statement, at 6 (emphasis added). “Your sentencing decision will be a consideration of Dzhokhar Tsarnaev’s character and his actions[.]” *Id.* at 10. “Nothing will explain his cruelty and his indifference . . . other than his own character.” *Id.* at 11; *Id.* at 12 (“It’s his character that makes the death penalty appropriate and just.”); *id.* (his “cruel character can be found . . . in his own reactions to those murders”). “You’re considering Dzhokhar Tsarnaev’s character.” *Id.* at 14.

Although the rules of evidence do not apply in this proceeding, they are instructive. “When evidence of a person’s character . . . is admissible, it may be proved by testimony about the person’s reputation or by testimony in the form of an opinion.” Fed. R. Evid. 405(a).

Lay opinion testimony is admissible when it is

- (a) rationally based on the witness’ perception;
- (b) helpful to clearly understanding the witness’ testimony or to determining a fact in issue; and
- (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Fed. R. Evid. 701.

Throughout the penalty phase, witnesses who knew the victims, as well as those who knew the defendant, have testified about what they were like.<sup>2</sup> Even if not prefaced

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<sup>2</sup> On May 5, the Court permitted a Deputy U.S. Marshal, during cross-examination to offer his opinion of a gesture made by the defendant, even though the marshal based that

by the phrase, “in my opinion,” this testimony clearly amounted to lay opinion testimony.

The fact that someone is sweet, generous, kind, or caring is not something that can be observed; it is essentially a lay opinion.

III. THE FACT THAT SISTER HELEN IS A NUN WHOSE WORK WAS THE SUBJECT OF A 1995 MOVIE SHOULD NOT DISQUALIFY HER AS A WITNESS.

Sister Helen’s testimony should not be excluded because she is clergy. In fact, clergy and prison chaplains often testify at capital trials. *See, e.g., Clark v. Mitchell*, 425 F.3d 270, 275 (6th Cir. 2005), (Catholic priest testified, *inter alia*, that, based on conversations with the defendant, he believed that the defendant was “was filled with remorse” over the victim’s death); *Johnson v. Bell*, 344 F.3d 567, 569 (6<sup>th</sup> Cir. 2003) (minister testified that defendant’s faith sustained him and “that he knew that ultimately one day he would have to give an accounting of his life to God”); *Glass v. Blackburn*, 791 F.2d 1165, 1168 (5<sup>th</sup> Cir. 1986) (minister testified as expert about morality of death penalty and, based on two interviews, on defendant’s remorse); *Stillings v. Bagley*, 561 F.Supp.2d 821, 868 (N.D. Ohio) (prison chaplain testified about defendant’s sincere expressions of remorse); *Kordenbrock v. Scroggy*, 680 F.Supp. 867, 888-90 (E.D. Kan. 1988), *overruled on other grounds*, 919 F.2d 1091 (6<sup>th</sup> Cir. 1990) (testimony from clergy about morality of death penalty excluded on relevance grounds and cumulative where member of clergy testified about defendant’s remorse and about “redemption”).

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interpretation on his own personal experiences, rather than any knowledge he had about the defendant.

Nor does the fact that her work has become known through her books and a movie preclude her testimony. The movie, "Dead Man Walking," was released in 1995, when several of the jurors were too young to have seen it. Most jurors will not recognize Sister Helen's name. Defense counsel does not intend to elicit evidence regarding the movie or books. If the movie or book had made such a lasting impression on any of the jurors, one would have expected them to mention it during the voir dire regarding views on the death penalty and what has informed them.

IV. SISTER PREJEAN'S TESTIMONY SHOULD NOT BE EXCLUDED  
BECAUSE OF THE TIMING OF THE NOTICE GIVEN.

The defense initially believed that the government's evidence regarding lack of remorse would focus on the so-called "boat writing." The defense did not learn until April 16 that the government sought to introduce a still from the cellblock video, when that exhibit was provided for the first time. (The video itself was included with terabytes of video material that had never been designated as potential exhibits and included countless surveillance and cell phone videos.)

On April 21, the government argued repeatedly, as set forth above, that the defendant remains unrepentant and uncaring. The very next day, the defense provided notice that Sister Helen Prejean would be a witness.

Respectfully submitted,

DZHOKHAR TSARNAEV  
By his attorneys

/s/ Miriam Conrad



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**Certificate of Service**

I hereby certify that this document and attachment was served upon opposing counsel by email on May 8, 2015.

/s/ *Miriam Conrad*